No. 155.

Brf. of West for D. E.

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Filed Dec. 26, 1900.

IN THE

# Supreme Court of the United States.

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W. P. SMITH,
Plaintiff in Error,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS,
Defendant in Error.

No. 155.

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## BRIEF FOR DEFENDANT IN ERROR.

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IN THE

# Supreme Court of the United States.

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W. P. SMITH,
PLAINTIFF IN ERROR,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS,
DEFENDANT IN ERROR.

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**Error to the Court of Civil Appeals, Second Supreme Judicial District of Texas.**

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## BRIEF OF DEFENDANT IN ERROR.

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### STATEMENT.

MAY IT PLEASE THE COURT:

From the allegations of the petition of plaintiff in error, and the undisputed facts appearing in the

7, title 102 of the Revised Statutes of Texas of 1895, do hereby declare that the quarantine lines, rules and regulations set forth in the above recited order of the Live Stock Sanitary Commission of Texas, shall be in full force and effect from and after this date.

In witness whereof I have hereunto set my hand, and caused the seal of State to be affixed at Austin, this 5th day of June, A. D. 1897.

(Seal.) C. A. CULBERSON,
Governor of Texas.

By the governor:
J. W. MADDEN,
Secretary of State."
(Pr. R., pp. 9, 12.)

IV.

At the time of the shipment of said cattle, and of their carriage by defendant in error, plaintiff in error and his co-owners had actual knowledge of the existence and promulgation of the above quoted quarantine regulation, but defendant in error did not have (Pr. R., p. 10, paragraph 7th).

V.

The trial court found as a fact, as follows: —

"I further find that said cattle were traded for in exchange for horses and mules, no money being paid for same, and were shipped after the promulgation

of the proclamation establishing the quarantine regulations above mentioned."

"The actual cash, fair market value of said cattle at the time and place of shipment, to wit: Plain Dealing, La., was the sum of $299.20.

## VI.

The cattle reached Fort Worth, Texas, on the evening of the 28th of August, 1897, where the owners tendered the amount of freight and demanded the delivery of said cattle, which was refused. The cattle remained in the pens of defendant in error until August 31st, 1897, and the stock yards at Forth Worth refused to receive said cattle in their pens on account of the proclamation of the governor of Texas quarantining Louisiana cattle; and the defendant in error made application to the Live Stock Commission of Texas for permission to deliver said cattle to the owners thereof, which was refused, and defendant in error shipped said cattle back to Texarkana, and there deliver them to the line of railway from which it received them, which line returned said cattle to Plain Dealing, Louisiana, and there tendered them to the shipper, who refused to receive them; and said connecting line, after properly advertising them, at the place from which they were shipped, sold said cattle and tendered the owners thereof $299.20, the proceeds of sale, which was also refused.

POINT FOR CONSIDERATION.

Were the quarantine regulations and orders of the Live Stock Sanitary Commission of Texas, promulgated by the proclamation of the Governor of said State, a valid exercise of the police powers of the State and binding upon its citizens?

## ARGUMENT

At the time of the institution of this suit, and until it was determined by the appellate court of Texas, there had been no decision by the courts of last resort in Texas, or elsewhere, as to the validity of the legislation herein involved. Manifestly the situation of the defendant in error was a serious one.

If the position taken by plaintiff in error, that when Congress has legislated at all upon a subject-matter within its province, its action is prohibitive of all State legislation, whether it incidentally affects commerce or not, be correct, then defendant in error is utterly without legal right or remedy; for, if the rule be applicable to the legislation in question, then it could be contended with equal force that where Congress has failed to legislate upon a matter within its sphere, such failure is equivalent to saying that such matter was to be left free of statutory regulations by the several States.

In Leisy v. Hardin, 135 U. S. 100, this court said: "Hence, inasmuch as interstate commerce consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indi-

cates its will that such commerce shall be free and untrammeled."

Clearly, the doctrine announced in the above quotation must be taken in connection with the qualifications placed thereon by various decisions of this court, especially with reference to the rights of the States to protect the public health, public morals and public safety. We particularly refer to the recent case of Mo. K. & T. Ry. Co. v. Haber, 169 U. S., and quote from page 628, as follows: "This court, while sustaining the power of Congress to regulate commerce among the States, has steadily adhered to the principle that the States possess, because they never surrendered, the power to protect the public health, the public morals and the public safety by any legislation appropriate to that end, which does not encroach upon rights guaranteed by the national constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument. Although the powers of a State must, in their exercise, give way to a power exerted by Congress, under the constitution, it has never been adjudged that that instrument, by its own force, gives any one the right to introduce into a State, against its will, cattle so affected with disease that their presence in the State will be dangerous to domestic cattle."

Plaintiff in error and his associates and co-owners of the cattle placed defendant in error, with actual knowledge of the existence of the quarantine orders, and its promulgation by the governor, in the position where it must either violate a statute of Texas, and be subject to a prosecution, for the penalties

therein prescribed, or to obey the law and subject itself to a suit for damages, at the instance of plaintiff in error.

We submit that under such circumstances a citizen can only elect to obey the law, otherwise every citizen must constitute himself a judicial tribunal, whose decision would be no protection, for whether he decided right or wrong he would be subjected to litigation, either at the hands of the State to recover the penalty, or at the hands of the shipper to recover damages.

In *State* v. *Carroll*, 38 Conn. 449 (9 Am. Rep. 428) the court said: "Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as, to all intents and purposes, law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society. It has never been questioned by any jurist to my knowledge." * * *

"The doctrine that a law of doubtful constitutionality may be presumed to be constitutional until judicially decided otherwise, and that a law manifestly unconstitutional can not be so presumed, has no existence as applicable to the citizen. There is a rule of judicial construction adopted by the courts, to the effect that unless the law is clearly unconstitutional, or if it is of doubtful constitutionality, they will not declare it unconstitutional. But that is a

rule of PURELY JUDICIAL CONSTRUCTION, and can have no other application. * * *

"It has never been claimed to my knowledge before, that the citizen may adopt the judicial rule of construction, and treat a law, if manifestly unconstitutional, as without the semblance or color of authority. It is an instance of the misapplication of an unquestioned rule."

*State* v. *City*, 41 La. Ann. 156, was a mandamus proceeding brought against the Mayor and Council of New Orleans to compel them to make an appropriation for maintenance of the police, the amount of which, by legislative enactment, was fixed at a sum not less than $150,000. The Mayor and Council tried to avoid the law, and set up in their answer that it was unconstitutional. At p. 166, the court said: "A government whose laws can be ignored by those whose duty it is to execute them is feeble, weak and inert, and is wanting in that vigor, strength and energy that will insure its perpetuity. The Mayor and City Council of New Orleans are the officers of a subordinate political corporation, not only charged with municipal duties, but as a constitutional part of the State government they owe allegiance and obedience to their sovereign, the State of Louisiana, whose majesty, dignity and power they must uphold, and whose mandates they must obey. They cannot defy the law, constitute themselves the judges of its constitutionality, and pronounce upon its validity when they are charged with its execution, in advance of the judicial tribunal, whose sole prerogative it is to pass upon its consti-

tutionality. It is their duty to obey the law until the law has been declared null and void by the judicial department of the government."

In *Holden* v. *Hardy*, 169 U. S., at pp. 392, 396, this court said: "While this court has held that the police power can not be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." Lawton v. Steele, 152 U. S. 133, 136.

"The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in Commonwealth v. Alger, 7 Cush. 84:—

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of

property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

In *Mo. K. & T. R. Co.* v. *Haber*, 169 U. S. at page 629, in which case the authorities are collated, this court quotes with approval, the language of the Supreme Court of Vermont in Thorpe v. Rutland & Burlington Railroad Co., 27 Vt. 149, as follows: "Under that power (referring to the police power), this court said that while a State by legislation may not invade the domain of the national government, it may *exclude* from its limits convicts, paupers, idiots, and lunatics, persons likely to become a public charge, as well as persons affected by contagious or infectious diseases — adding that the same principle would justify exclusion of property dangerous to the property of citizens of the State, for example, *animals having contagious or infectious diseases.*' Such exertions of power by a State, it was said, were self-defensive."

In *Kimmish* v. *Ball*, 129 U. S. 217, this court said: "That cattle coming from those sections of the country (referring to Texas and Indian Territory) during the spring and summer months are often infected with a contagious and dangerous fever, is a notorious fact, as is also the fact that cold weather, such as is usual in the winter, north of the

southern boundary of Missouri and Kansas, destroys the virus of the disease, and thus removes all danger of infection."

The appellate court of Texas, in the case now before this court (Pr. R., p. 28) said: "So far as the record shows, every animal of the kind prohibited in the State of Louisiana may have been actually affected with charbon or anthrax, and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

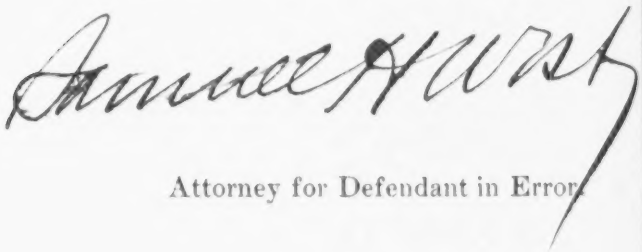
The court will also bear in mind that the Live Stock Sanitary Commission of Texas found, as a matter of fact, "that cattle, mules and horses in the southern portion of Jefferson County, State of Texas, are affected with the disease known as charbon or anthrax, and are liable to impart such disease to cattle, mules and horses ranging in upper portion of Jefferson and other counties," therefore prohibited the transportation of cattle from that section of Texas. Said Live Stock Commission also stated that it had "reason to believe that charbon or anthrax has or is liable to break out in the State of Louisiana" (Pr. R., p. 12).

Upon such findings of fact the quarantine regulations complained of by plaintiff in error were promulgated. It was found as a fact by the Texas Court of Civil Appeals, that no testimony was offered controverting these findings of fact, so announced by the Live Stock Sanitary Commission and the proclamation of the governor, and we submit that in the absence of that proof, upon the findings of

fact so stated, this court will not interfere with or annul the statutory enactments of the State of Texas. For, as was said by Chief Justice Marshall, in Fletcher v. Peck, 6 Cranch, 128: "The question whether a law be void for its repugnance to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void."

We submit that the judgment of the Court of Civil Appeals for the District of Texas is right and the judgment should be affirmed.

Respectfully submitted,



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